APPEAL NO. 001968

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held in (City 1), Texas, on July 13, 2000. The issue was did the appellant (claimant) have disability from March 11, 1999, through April 4, 2000. The hearing officer determined that on _____, the claimant was an employee of the employer; that he was injured in the course and scope of his employment on that day; that on _____, the claimant resided within 75 miles of the City 1 field office; that the claimant was able to work from March 11, 1999, through April 4, 2000; and that the claimant did not have disability from March 11, 1999, through April 4, 2000. The claimant appealed. He stated that he is an independent contractor, that he lives more than 75 miles from the City 1 field office of the Texas Workers' Compensation Commission (Commission), that no effort was made to hold the CCH in another location, that he did not receive proper assistance from the ombudsman who assisted him concerning the 75-mile rule, that the videotapes of him were taken at the motocross track without the permission of the owner of the track, and that he was unable to perform his profession because of the injury to his right knee. The claimant requested that the Appeals Panel reverse the decision of the hearing officer. A reply from the respondent (carrier) has not been received.

DECISION

We affirm.

We first address the venue issue. The transcript of the CCH contains:

> HEARING OFFICER: * * * * * May we stipulate that venue is proper in the [City 1] Field Office, Ombudsman?
>
> [Ombudsman]: Yes, sir.
>
> HEARING OFFICER: Carrier?
>
> MR. S: Yes, sir.
>
> HEARING OFFICER: So stipulated. I believe that concludes jurisdictional and venue requirements.

There was no mention of 75 miles at the CCH. At the conclusion of the CCH, the hearing officer asked the claimant if he was satisfied with the assistance the ombudsman had provided and the claimant responded with yes.

Section 410.005 provides:

> Unless the commission determines that good cause exists for the selection of a different location, a benefit review conference or a [CCH] may not be conducted at a site more than 75 miles from the claimant's residence at the time of the injury.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.9(a) (Rule 142.9(a)) provides in part:

> At any time before or during the hearing, parties may:
>
> (1) enter into stipulations, as provided by §140.1 of this title (relating to Definitions); [.]

Stipulation is defined as "[a] voluntary accord between parties to a benefit [CCH] regarding any matter relating to the hearing that does not constitute an agreement, as defined by . . . ." Rule 140.1. Neither the 1989 Act nor Commission rules prohibit stipulations that are conclusions of law; however, the better practice is for a hearing officer to propose a stipulation of fact. That is especially so when a hearing officer makes a finding of fact that includes a fact that is not in the stipulation. In the case before us, the stipulation should have addressed whether the claimant's residence at the time of the injury was more than 75 miles from the City 1 field office.

The hearing officer's decision was sent to the claimant at an address in (City 2), Texas, and the envelope the claimant's appeal was sent in has the same address as the claimant's return address. The claimant testified that he lived outside of City 2. If official notice is taken of a Texas road map, it appears that by one route City 1 and City 2 are about 65 miles apart and by another route they are about 76 miles apart. But that information does not necessarily indicate the distance between the claimant's residence and the City 1 field office. In view of the stipulation and no evidence on the distance from the claimant's residence to the City 1 field office, we do not determine that it was error to hold the CCH in the City 1 field office.

The claimant stated that he is an independent contractor and was not an employee of the employer. If the claimant was not an employee of the employer, he could not have sustained a compensable injury. We will not address the claimant's statement about a determination that is favorable to his position.

We next address the claimant's statement about the videotapes. At the CCH, the claimant did not object to the admission of the videotapes of him and he testified about his activities shown in the videotapes. If the statement in the claimant's appeal that the videotapes were taken at the motocross track without the permission of the owner of the track is considered as appealing the admissibility of the tapes, it was raised for the first time on appeal and will not be considered.

It was undisputed that the claimant injured his knee in the course and scope of his employment on _____; that he had a torn anterior cruciate ligament; that surgery was needed; and that surgery was performed on April 5, 2000. Some of the delay in having the surgery was because the surgeon wanted the claimant to stop smoking and because the claimant was treated for pancreatitis in August and September 1999. The claimant testified that he drove a truck, delivered furniture, and was required to do heavy lifting and to go up and down stairs. The carrier had admitted into evidence two videotapes of the claimant. The claimant was videotaped in March, May, June, July, September and October 1999 and in February 2000. The claimant did not deny that he did the things shown in the videotapes, but contended that he could not perform the work that he was doing at the time that he was injured. In the statement of the evidence in his Decision and Order, the hearing officer wrote "[v]ideos reflect Claimant is able to ride a 4-wheeler, drive a bulldozer, climb stairs, climb on to a pickup, climb on the cab of a truck, jump from the truck to the ground, and run." Viewing of the videotapes does not indicate that the hearing officer's description is not accurate.

In a note dated February 18, 1999, Dr. P, one of the doctors who had treated the claimant, said that the claimant could not be on his feet more than one hour a day. On March 29, 1999, Dr. P recorded that the claimant was thinking about surgery and was considering his options. In a letter dated March 1, 2000, Dr. P stated that based on the claimant's activity documented on videotape, he did not have a problem with the claimant's working without restrictions until he had his ligament reconstruction; that he, Dr. P, was relocating to another state; and that another doctor would perform the surgery.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, determines the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Only were we to conclude, which we do not in this case, that the hearing officer's determination that the claimant did not have disability as claimed is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, would there be a sound basis to disturb that determination. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determination of the hearing officer, we will not substitute our judgment for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We affirm the decision and the order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge